LIBRARY

Office-Supreme Court, U.S.
FILED
DEC 5 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 834

In the Matter of

JACOB A. MILLSTEIN,

Petitioner,

against

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

LEONARD FELDMAN,
Attorney for Petitioner,
350 Fifth Avenue,
New York, New York,
(212) LO 5-1500.

BLANK

PAGE

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Proceedings Below	2
Questions	6
Constitutional Provisions Involved	8
Statutes Involved	8
Statement	10
Reasons for Allowance of the Writ	12
Conclusion	15

Appendix A:

Order of Disbarment	1a
Opinion	5a
Order Denying Leave to Appeal	10a
Notice of Entry	11a
Notice of Appeal	12a
Order Denying Leave to Appeal	13a
Order of Court of Appeals Dismissing Appeal	14a

Cases Cited

PAGE

Brady v. *State of Maryland*, 373 U. S. 83, 87, 83 S. Ct. 1194 13

Matter of Mathot, 222 N. Y. 8, 117 N.E. 948 12

Matter of Meacham, 5 N. Y. 2d 985 13

People v. *Fein*, 18 N. Y. 2d 162, 272 N.Y.S. 2d 753 14

Smith v. *Pennsylvania*, 376 U. S. 354, 84 S. Ct. 763 13

Willner v. *Committee on Character and Fitness*, 373 U. S. 96, 83 S. Ct. 1175 14

Constitutional Provisions Cited

Constitution of the United States, Fourteenth Amendment, Due Process Clause 8

Statutes Cited

New York Civil Practice Law and Rules, Section 105 8

New York Civil Practice Law and Rules, Section 3101 ..... 12, 15

New York Judiciary Law, Section 90 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

In the Matter of

JACOB A. MILLSTEIN,

Petitioner,

against

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

The petitioner above named respectfully prays that a Writ of Certiorari issue in the above captioned proceeding directed to the Supreme Court of the State of New York, Appellate Division, First Department, to review its order dated March 10, 1966 and entered in the Office of the Clerk of that court on March 10, 1966 (1a).[1]

1. Parenthetic references are to the Appendix hereto unless otherwise noted. Parenthetic references designated (A) are to the Appendix in a prior petition to the Court as noted therein.

Opinions Below

The only opinion below was that which accompanied the aforesaid order of March 10, 1966 of the Appellate Division, First Department reported in 25 A.D. 2d 129 (1966), 267 N.Y.S. 2d 732, 1966 and is set out in the Appendix hereto (5a).

There were no other opinions by either the said Appellate Division or by the Court of Appeals of New York in any of the preliminary proceedings heretofore had and hereinafter detailed.

Jurisdiction

The order of the Court of Appeals which finally determined the above captioned proceeding in New York, was dated and entered September 22, 1966 (14a). The time within which a petition for a writ of certiorari may be filed will expire on December 21, 1966.

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257.

Proceedings Below[2]

Petitioner is the respondent in a disciplinary proceeding brought against him by the respondent Co-ordinating Committee on Discipline.

Pursuant to the practice of the Appellate Division, a Referee was appointed to take testimony and report to the Supreme Court of the State of New York, Appellate Division, First Department (before whom the disciplinary proceeding was pending).

2. Two prior petitions for writs of certiorari were made to this Honorable Court during the pendency of the proceedings below and are detailed in this section for being an integral part of such proceedings.

After the appointment of the Referee, but prior to the commencement of the hearings before the Referee, the petitioner, pursuant to the provisions of the Civil Practice Law and Rules of New York, moved in the Appellate Division, First Department, for an order granting him a discovery and inspection preliminary to trial. That motion was denied on October 3, 1963 (the order denying the motion was not published). No opinion was written. Thereafter, on October 25, 1963, the petitioner timely moved for reargument before the said Appellate Division, or in the alternative, for leave to appeal to the Court of Appeals. That motion was also denied in its entirety, without opinion, by order dated November 19, 1963. (There was also no publication of that order.) Thereafter, petitioner timely moved before the Court of Appeals of the State of New York for leave to appeal to that Court. By order dated January 19, 1964, the Court of Appeals dismissed that motion, without opinion; see 13 N. Y. 2d 1119. New York. Thereafter, although the matter was not concluded in New York, but because of the prejudice alleged, petitioner sought a writ of certiorari in this Court. Certiorari was denied by this Court in 377 U. S. 933, 84 S.C. 1337, 12 L. Ed. 2d 297 (1963).

Hearings commenced before the Referee and the Coordinating Committee on Discipline, respondent herein, presented its proof. At the close of the respondent's case (respondent was the prosecutor below), petitioner moved before the Referee (A 13a-16a in this Court, No. 455, October 1965) for a disclosure of certain very specific evidence in the possession of respondent (A 12a-14a in this Court, No. 455, October, 1965). The Referee did not rule on the motion, but remitted the matter to the Appellate Division, First Department, ruling that such a motion for discovery properly lay before that Court (A 15a-16a in this Court, No. 455, October, 1965).

By motion duly made, the petitioner then moved in the Appellate Division, First Department, for an order directing the respondent to disclose to the petitioner all statements, testimony or documents relating thereto in the possession of the respondent and by whomsoever made and relating to the issues before the Referee, but which had not been disclosed to the petitioner (A 5a in this Court No. 455, October, 1962). By order dated and entered on March 18, 1965, the said motion was denied in all respects (A 4a in this Court, No. 455, October, 1965). There was no opinion by the Appellate Division and no publication of the order of denial. Thereafter, the petitioner timely moved for leave to reargue the said motion, or in the alternative for leave to appeal to the Court of Appeals of the State of New York. The said motion for reargument, or in the alternative for leave to appeal, was denied in all respects by the Appellate Division by order dated and entered April 13, 1965 (A 46a in this Court, No. 455, October, 1965). Again there was no opinion and no publication of said order. The petitioner moved in the Court of Appeals for leave to appeal to that Court. By order dated May 20, 1965, the Court of Appeals denied the said motion; N. Y. 2d (A 2a in this Court, No. 455, October, 1965). There was no opinion written by the Court of Appeals. Although the proceeding was not final, petitioner petitioned this Honorable Court for a Writ of Certiorari on the aforedescribed denial of discovery. This petition was denied, see *In the Matter of Anonymous, An Attorney* v. *Co-ordinating Committee on Discipline,* No. 455, October Term, 1965, 382 U. S. 902, 86 S. Ct. 237, 15 L. Ed. 2d. 157 (decided November 8, 1965).

The hearings before the Referee then proceeded to whatever defense the petitioner was able to offer following the denial of disclosure. Thereafter the Referee reported his recommendations to the Appellate Division. On the basis of that report an order of disbarment was made by the Appellate Division, dated and entered in the Office of the Clerk of that Court on March 10, 1966. (1a) 25 A.D. 2d 129, 267 N.Y.S. 2d 732.

By motion timely made, petitioner moved in the Appellate Division, First Department, for leave to reargue or, in the alternative, for leave to appeal to the Court of Appeals from the order of March 10, 1966, and also moved for a stay of the order of disbarment or an extension of the effective date thereof. That motion was denied in all respects on April 12, 1966, by the Appellate Division, First Department, see A.D. 2d , N.Y.S. 2d (10a).

Petitioner then took an appeal as of right on the constitutional questions raised by the refusal to disclose evidence (13a) and, in addition thereto, moved in the Court of Appeals for leave to appeal on the non-constitutional issues raised in the proceedings against him. The motion for leave to appeal on the non-constitutional issues was denied by the Court of Appeals, see N. Y. 2d , N.Y.S. 2d (13a).[3]

With regard to the appeal taken as of right to the Court of Appeals of the State of New York on the constitutional questions, the respondent moved in that court to dismiss the appeal on the ground that such constitutional questions were not substantial.[3] The Court of Appeals granted that motion[3] on September 22, 1966 on the ground that the constitutional questions were not sub-

3. See certified record submitted with this petition.

stantial (14a) see N. Y. 2d , N.Y.S. 2d .

All proceedings below have now been concluded to finality.

Questions

1. Is a New York disciplinary proceeding against an attorney *sui generis* so that he may be denied the statutory right of discovery granted by the Civil Practice Law and Rules of New York to all other litigants and thus be deprived of the equal protection of the laws of New York?

2. Do the rules of disclosure of evidence enunciated by this Honorable Court as applicable to all criminals, regardless of how lowly their station or heinous the crime, apply under the Due Process Clause of the Fourteenth Amendment to an attorney defending himself against disbarment?

3. Is the determination by a prosecuting attorney that he need not disclose evidence in his possession because he believes that such evidence will not aid the defense of an attorney being prosecuted in a disciplinary proceeding and hence refuses to disclose such evidence, conduct sanctioned by the Due Process Clause of the Fourteenth Amendment?

4. Does the Fourteenth Amendment apply to disciplinary proceedings against attorneys even though such proceedings may not be strictly criminal or civil in nature?

5. Where a judicial prosecuting agency, after presentation and conclusion of its entire case against an attorney in a disciplinary proceeding, admits that it still has undis-

closed evidence in its possession relating to the principal issues in such proceeding, but refuses to disclose such evidence even though timely demands have been made therefor, do such refusals to disclose constitute a denial of due process within the contemplation of the Constitution of the United States?

6. In the absence of any statute or rule of court sanctioning such a denial, may an attorney accused in a disciplinary proceeding designed to deprive him of his right to practice law, be denied the use of usual, ordinary, normal and regular discovery procedures, especially when such remedies are available by statute to all other litigants in the State of New York?

7. In the absence of any statute or rule of court sanctioning such a denial, may an attorney accused in a disciplinary proceeding designed to deprive him of his right to practice law, be denied the use of usual, ordinary, normal and regular discovery procedures, especially when such remedies are available by statute to all other litigants in the State of New York and disclosure can no longer prejudice the prosecution because it has concluded its presentation of evidence and rested its case?

8. Where, without sanction of statute or rule of court providing therefor, an attorney is denied the normal and regular statutory discovery procedures available to all other litigants in New York, is such a denial a denial of due process or the equal protection of the laws within the contemplation of the Constitution of the United States as will render unconstitutional the proceeding and any judgment deriving therefrom?

Constitutional Provisions Involved

The provision of the Constitution of the United States involved herein is the 14th amendment, the pertinent provision of which is as follows:

> "Section 1 ' * * * nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' "

Statutes Involved

New York Civil Practice Laws and Rules:

> "§105. Definitions.
>
> * * * * *
>
> (b) Action and special proceeding. The word 'action' includes a special proceeding; the words 'plaintiff' and 'defendant' include the petitioner and the respondent, respectively, in a special proceeding; and the words 'summons' and 'complaint' include the notice of petition and the petition, respectively, in a special proceeding."
>
> "§3101. Scope of disclosure.
>
> (a) Generally. There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:
>
> (1) a party, or the officer, director, member, agent or employee of a party;
>
> (2) a person who possessed a cause of action or defense asserted in the action;
>
> (3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable

grounds of belief that he will not be able to attend the trial; and

(4) any person where the court on motion determines that there are adequate special circumstances."

New York Judiciary Law:

"§90. Admission to and removal from pratice by appellate division.

* * * * *

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice."

* * * * *

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner

other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges. * * *"

Statement

Petitioner here, a respondent in a disciplinary proceeding, was charged with a number of ethical violations. Petitioner timely moved, before commencement of the actual trial of the charges, for a discovery and inspection as prescribed by Civil Practice Law and Rules of New York, section 3101. That motion was denied without opinion.[4]

Respondents here then presented their evidence against petitioner before a referee appointed to hear and report, and then rested their case (A 13a-14a; in this Court No. 455, October, 1965). At that point, at the conclusion of respondents' case, but before commencement of petitioner's defense, and in response to petitioner's demand, respondents' trial counsel conceded that respondents were in possession of sworn testimony and statements of persons who had not been called by respondent as witnesses at the trial. Respondents' counsel refused to disclose to petitioner the statements made by such persons (A 13a-16a in this Court, No. 455, October, 1965). There is no dispute that the witnesses who were not called were persons who were

4. The section "Proceedings Below" hereinbefore set forth details the citations of this preliminary proceeding.

directly and critically involved in the principal events from which the charges against petitioner stemmed (A 12a-14a, in this Court, No. 455, October, 1965). Those charges were the only ones sustained against petitioner by the Appellate Division, First Department (A). That court dismissed all the other charges against petitioner.

Respondents have taken and maintain the position that they are not required to disclose sworn statements or testimony received by respondents *in camera* (and in the absence of petitioner or his counsel) so long as they did not produce the persons giving such evidence as witnesses against petitioner before the hearing referee.

In addition, respondents have taken, and maintain the position that in their view the evidence concerned was not "in aid of petitioner's defense" (see page 10 of respondents' Brief in Opposition in this Court on No. 455, October, 1965).

Whether the courts of New York agree with respondents or have acted on other grounds is not known, for no opinions have been written.

The evidence sought involved the sworn statements given by the three witnesses, Cruz, Padilla and Holt (A 12a-14a in this Court, No. 455, October, 1965) and any other witnesses who like them were heard by respondents *in camera* and not called.

The three named witnesses above were the ones who were directly involved in the only charges of which the petitioner was found guilty.

As a result of the refusal of the courts of New York to grant petitioner any relief from the refusal of respondents to produce the statements given by the uncalled witnesses, petitioner was compelled to proceed to his defense with evidence which was denied to him either for perusal or use in aid of his defense.

Reasons For Allowance of The Writ

The sense of fairness which is the essence of due process is offended when evidence, regardless of its ultimate impact on the outcome of a proceeding, is admittedly available, but is withheld by a prosecutor.

A disciplinary proceeding, directed as it is against an officer of the court, which, if successfully prosecuted, results in public disgrace and the loss of an honorable and valuable privilege, is as much a prosecution as any criminal proceeding, and for being such invokes the same high standards as control the conduct of a criminal prosecution.

Even if the very highly distilled reasoning of respondents heretofore advanced to this Court is indulged, that a disciplinary proceeding is *"sui generis"*[5] and hence neither a civil nor a criminal proceeding, it does not follow that the existence of such an involved legal curiosity means that due process may be denied a litigant such as petitioner who, regardless of such exegetics is, defending himself in a proceeding designed to deprive him of status or privileges, or both.

Actually the attempt to deny petitioner's right to discovery on the ground that a disciplinary is some unique kind of proceeding, is not the law of New York.

New York's Civil Practice Law and Rules, section 3101, requires full disclosure in every civil action. "Action", as defined by New York Civil Practice Law and Rules, section 105, includes a "special proceeding", and *Matter of Mathot,* 222 N. Y. 8, has held that in New York a disciplinary proceeding against an attorney is a "special proceeding" and governed by the rules of civil procedure.

Respondents here have prosecuted the petitioner, have presented all the evidence they wished to present and then

5. See page 13 of respondents' "Brief in Opposition" in this Court, No. 455, October, 1965.

rested. They admitted they were in possession of certain statements given by persons directly and critically involved in the principal charges against petitioner, but refused to divulge those statements to petitioner because they did not call as witnesses the persons who gave them.[6]

This Court, within the past few years, has expressed itself forcefully on the requirements of disclosure as a necessary element of due process. No great analysis need now be advanced to establish as law a principle which is now firmly fixed in the law.

Brady v. *State of Maryland,* 373 U. S. 83, 87, 83 S. Ct. 1194;

Smith v. *Pennsylvania,* 376 U. S. 354, 84 S. Ct. 763.

All that remains is to establish that the principle of full disclosure is not to be denied to an attorney on the specious theory that he belongs to some special class to whom the standards of due process do not apply.

In the light of the standards as reemphasized in *Brady,* it follows that it is equally as unfair to prosecute a lawyer and attempt to disbar him while withholding evidence which may aid his defense or exonerate him.

---

6. In New York the sworn testimony of a witness given in the course of the investigation which precedes a disciplinary proceeding is admissible in the course of the disciplinary proceeding itself even if the witness has died before being called. The ruling is contained in an unreported decision by the Appellate Division, First Department, which refused to reverse a referee who ruled such testimony admissible. The Court of Appeals dismissed the appeal taken from the refusal of the Appellate Division to reverse that ruling. *Matter of Meacham,* leave to appeal denied 5 N. Y. 2d 985. As is the practice in New York, the order of the Appellate Division was not published. Presumably the same rule would obtain when a witness disappears before being called. In the case at bar counsel for respondents made a somewhat vague statement that one of the uncalled witnesses had returned to Puerto Rico, but offered no proof as to why the other uncalled witnesses could not appear (A 12a-13a in this Court, No. 455, October, 1965).

If a mere applicant for admission to the bar is entitled to due process (*Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, 83 S. Ct. 1175), then reason would seem to dictate that due process must also be available to an attorney who seeks to defend himself against an attempt to disbar him.

To withhold evidence and refuse to make it available to petitioner not only offends that sense of fairness heretofore alluded to, but also denies petitioner the use and hence the equal protection of the very statutory provisions in New York which require that full disclosure which is respondents' obligation and which petitioner has thus far vainly sought.

As recently as July 7, 1966, Hon. Stanley Fuld, soon to be Chief Judge of the New York Court of Appeals, dissenting in *People* v. *Fein,* 18 N.Y. 2d 162, 272 N.Y.S. 2d 753, stated the rule of disclosure to be as follows:

> The prosecution is not privileged "to decide for the court what is admissible or for the defense what is useful". (Griffin v. United States, 87 U. S. App. D.C. 172, 183 F. 2d 990, 993.)
>
> The argument that disclosure would not have changed the verdict "overlooks the variant functions to be performed by jury and reviewing tribunal". (People v. Savvides, 1 N.Y. 2d 554, 557, 154 N.Y.S. 2d 885, 887, 136 N.E. 2d 853, 854, supra.) It is for jurors, not judges of an appellate court such as ours, to decide the issue of credibility, and we should be particularly observant of this principle in the case before us, where disclosure might well have impeached the one witness without whom there would admittedly have been no prosecution. In this view, it "matters little" that the district attorney's silence was not the result of guile or a desire to prejudice. (People v. Savvides, 1 N.Y. 2d 554, 557, 154 N.Y.S. 2d 885, 887, 136 N.E. 2d 853, 855, supra.) "The principle of Mooney v. Holohan [294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, supra]," as the Supreme Court has pointedly observed (Brady v.

State of Maryland, 373 U. S. 83, 87, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215, supra), "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."

The rule of disclosure is a rule of fairness unrestricted in its application to fine distinctions between civil and criminal causes. The ancient common law technique of trial by trick and surprise is, on the civil side, almost as dead as the dodo with discovery and pretrial disclosure liberally and unstintingly granted. Certainly, in the light of C.P.L.R. 3101, the petitioner has been deprived of the equal application of that statute by a denial of discovery to him contrary to the express language of that statute.

If it now be argued that petitioner is not entitled to disclosure under the standards of *Brady* because a disciplinary proceeding is not a criminal proceeding, it means that, for some still unannounced reason, disclosure though available to criminals and civil suitors is not available to attorneys who are under charges in New York.

When a lawyer is charged with having failed in his ethical obligations and it is proposed to strip him of his privileges and brand him forever with a mark of shame, it seems only fair to accord him, at the very least, the same rights and fairness of trial as are made available to the meanest souled suitors and lowliest criminals. Anything less would seem to strike at the heart of our whole philosophy of law and make fairness as a standard of due process in our jurisprudence a meaningless shibboleth rather than a meaningful fact—at least for attorneys under charges.

CONCLUSION

It is respectfully submitted that the writ sought be granted.

Respectfully submitted,

LEONARD FELDMAN
Attorney for Petitioner

BLANK

PAGE

APPENDIX

Order of Disbarment

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 10th day of March, 1966.

Present—Hon. BERNARD BOTEIN, Presiding Justice.
" CHARLES D. BREITEL,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" ARON STEUER,
Justices.

In the Matter of

JACOB MILLSTEIN, An Attorney

Jacob Burns, Peter H. Kaminer, and Magnus Lipton, as members of the Co-ordinating Committee on Discipline of The Association of the Bar of the City of New York, The New York County Lawyers' Association and Bronx County Bar Association, by Henry Weiner, Esq., their attorney, having presented to this Court on the 30th day of April, 1963, a petition containing charges of professional misconduct against the above-named respondent, Jacob Millstein, Esq., who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 20th day of April, 1931, at a term of the Appellate Division of the Supreme Court, First Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared

herein by his attorney, Leonard Feldman, Esq., and having interposed an answer to said petition, duly verified the 30th day of April, 1963, and the Court having duly made and entered an order on the 16th day of May, 1963, appointing Paul R. Shaw, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and a hearing, pursuant to said order of reference having been duly held before the said Referee and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated the 31st day of August, 1965, and was filed in the office of the Clerk of this Court on the 2nd day of September, 1965;

And the petitioner thereafter and on the 7th day of December, 1965, having moved for an order confirming the Referee's report with respect to the findings therein and disaffirming said report with respect to Charge No. 5 and Charge No. 8, and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper;

Now, upon reading the petition of the Co-ordinating Committee on Discipline, verified the 28th day of March, 1963, the affidavit of Henry Weiner, Esq., annexed thereto, sworn to the 28th day of March, 1963, the notice of presentation of said petition, dated the 28th day of March, 1963, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified the 30th day of April, 1963, the order of this Court, dated the 16th day of May, 1963, appointing Paul R. Shaw, Esq., as Referee herein, all of which papers were duly filed

in the office of the Clerk of this Court on the 16th day of May, 1963, the report of Paul R. Shaw, Esq., the Referee herein, dated the 31st day of August, 1965, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on the 2nd day of September, 1965; and upon reading and filing the notice of motion for an order confirming the report of the Referee and adjudging the respondent guilty of professional misconduct, dated the 8th day of October, 1965, with proof of due service thereof, and after hearing Mr. Angelo T. Cometa for the motion to confirm the Referee's report with respect to the findings therein, and disaffirming said report with respect to Charge No. 5 and Charge No. 8, and Mr. Leonard Feldman opposed, and due deliberation having been had thereon; and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

Ordered that the said Jacob Millstein be and he hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York effective April 11, 1966, and it is further unanimously

Ordered that the name of the said Jacob Millstein be struck from the roll of attorneys and counselors-at-law in the State of New York effective April 11, 1966, and it is further unanimously

Ordered that the said Jacob Millstein be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk

or employee of another, effective April 11, 1966, and it is further unanimously

Ordered that the said Jacob Millstein be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective April 11, 1966, and it is further unanimously

Ordered that the said Jacob Millstein be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, effective April 11, 1966.

Enter:

HYMAN W. GAMSO
Clerk

APPELLATE DIVISION—SUPREME COURT—FIRST DEPARTMENT

STATE OF NEW YORK

I, HYMAN W. GAMSO, Clerk of the Appellate Division of the Supreme Court, First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on Mar 10 1966 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on Mar 10 1966.

HYMAN W. GAMSO
Clerk

Opinion

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT, DECEMBER 1965

BERNARD BOTEIN., P.J.,
CHARLES D. BREITEL,
HAROLD A. STEVENS,
SAMUEL W. EAGER,
ARON STEUER, JJ.

In the Matter of

JACOB MILLSTEIN, an Attorney

Disciplinary proceedings instituted by the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association. Respondent was admitted to the Bar on April 20, 1931, at a Term of the Appellate Division of the Supreme Court in the First Judicial Department.

Leonard Feldman of counsel (Eiber, Okin, Rafsky & Feldman, attorneys) for respondent.

Angelo T. Cometa (James J. Fitzpatrick with him on the brief), attorney for petitioners.

Per Curiam:

The petition herein of the Co-ordinating Committee on Discipline preferred 13 charges against respondents, of which one was withdrawn during the hearings before the Referee. The Referee's report substantially sustains charges 1, 2, 3, 7, 11 and 12 and finds the remaining six charges not proven. Petitioner moves for an order confirming the report, except to the extent that it fails to

sustain charges 5 and 8; as to those charges disaffirmance is sought.

Respondent was admitted to practice on April 20, 1931. Charges 1, 2 and 7 arise from his relationship with Irving Dansker and Bert G. Sapot, two young lawyers admitted to practice in March 1958. Dansker and Sapot both resigned from the bar in May 1961 and later that year pleaded guilty to the charge of soliciting on behalf of an attorney and were placed on probation.

After graduation from law school Dansker worked for respondent's firm, which had offices at 320 Broadway in Manhattan. In the spring of 1958 he and Sapot, who was working in another law office, formed a partnership and in late summer opened an office on Second Avenue between 120th and 121st Streets. Thereafter they became attorneys of record in a large number of personal injury cases which they referred to respondent for prosecution and settlement, the legal fees, after reimbursement of respective expenses, being divided equally between their firm and his.

According to the testimony of Dansker and Sapot they had engaged in a continuous course of solicitation of claims, and the substance of the first charge against respondent is that their improper activities had been undertaken at his suggestion and carried on with his guidance and financial assistance. Among the expenses taken into account in the division of fees, Dansker and Sapot testified, were not only commissions to tow truck operators and auto body repairmen for obtaining cases, but also—which is the subject of charge 2—payments by respondent to insurance company personnel for the purpose of influencing settlements. Charge 7 accuses respondent of himself requesting two of the tow truck

operators to solicit for him after he had been informed by Dansker and Sapot that they had decided to cease soliciting.

The record supports the Referee's conclusions regarding this group of charges. Conceding that he "should have noticed that the number of cases being referred to the partnership by Dansker and Sapot was large for two young lawyers who had only recently started in practice", respondent would seek to limit his guilt to a lack of care in failing to inquire into their sources of business. Such a limitation is in our opinion inconsistent with the evidence, which on this group of charges discloses sufficient corroboration of the narrative of Dansker and Sapot to warrant its acceptance in pertinent essentials.

Respondent had one partner, whose time, unlike his, was mainly devoted to trial work, and their legal staff was a small one. Respondent's relationship with Dansker and Sapot was of an unusual closeness, if one may judge, among other things, by undenied testimony that at his instance some Dansker and Sapot letterheads were prepared on which respondent's address is indicated as their "downtown office" and his telephone number as their "downtown" number. That respondent was totally ignorant of the sources of the large volume of cases Dansker and Sapot so rapidly accumulated would seem a most generous inference. But other parts of the record negate it. Noteworthy is respondent's unwillingness to meet the allegation of payments to insurance company personnel beyond denials in general terms.

According to Dansker and Sapot respondent had told them that when he made such payments he would report the amounts to them "by little phrases", to quote Sapot's

testimony, "such as special investigations, or special disbursements, or extraordinary disbursements, or unusual investigation, and when we would see one of those phrases we would know that he paid off a man in the insurance company." Letters from respondent's firm containing such phrases were introduced in evidence, but although respondent denied that the letters referred to payments to insurance company adjusters, he made no attempt to explain what expenses the amounts stated in the letters represented; nor could attorneys in his office do so. Among the asserted recipients of such payments was one whom respondent had identified for Dansker and Sapot by name and company, according to their testimony, but respondent failed to call him although stating they were friendly. Sapot's testimony that respondent had met with the tow truck operators and asked them to solicit directly for him was adequately confirmed, not alone by them, but by a client one of them had referred to respondent. Here, too, we note, respondent failed to call an employee of his firm said by Sapot to have attended the meeting.

Charge 3, in our view, was not proven as alleged. Admittedly respondent deposited in the bank account of one Badway, an insurance company employee, $100 on May 31, 1960, $150 on June 10, 1960, and $350 on June 21, 1960. It is charged that these payments had the effect of corruptly influencing Badway in connection with settlements of personal injury claims negotiated by respondent with Badway's company. Badway testified that he had certain settlement powers, but there is no showing that the payments, which Badway said were loans to him, had actually influenced settlements in the past or that respondent had claims pending with Badway's company when the payments were made. But we may not ignore these facts—

that deposits in a bank account are an unusual way of making loans, and no notes were given; that Badway could not remember why he needed the money; that the money was not repaid until after Badway had appeared before the Co-ordinating Committee; and that respondent chose not to testify about the circumstances of the loans. His failure to offer any explanation evidences a reprehensible lack of the candor and good faith expected from a member of the profession.

Charges 11 and 12 relate to respondent's failure to file, or join in the filing of, closing statements pursuant to the applicable rules of this court in effect before July 1, 1960. The Referee's interpretation of the then rules is correct, and respondent was required to file closing statements in such circumstances; but as we are aware that the different interpretation on which respondent testified he relied was shared by a number of others at the bar, we think it proper that these two charges be disregarded.

In refusing to sustain charges 5 and 8 the referee commented upon the lack of corroborating proof. Contrary to petitioner's contention, we do not think the comment indicates that the referee was applying a standard of proof more rigorous than that required in a disciplinary proceeding. We are not persuaded to set aside his disposition of these charges, since they hung on the credibility of respondent and his accusers, all of who testified before the referee, and find it unnecessary to detail them.

The seriousness of respondent's misconduct requires no elaboration. (See *Matter of Rothenberg*, 18 A D 2d 397; *Matter of Levine*, 254 App. Div. 165; *Matter of Bennett*, 20 A D 2d 218; affd. 15 N. Y. 2d 645; *Matter of Gladstone*, 16 A D 2d 512, 515; *Matter of Benjamin*, 13 A D 2d 221.) Respondent should be disbarred.

Order Denying Leave to Appeal

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 12th day of April, 1966.

Present—Hon. Bernard Botein, Presiding Justice.
" Charles R. Breitel,
" Harold A. Stevens,
" Samuel W. Eager,
" Aron Steuer, Justices

In the Matter of

Jacob Millstein, An Attorney

The above named respondent, Jacob Millstein, having moved for leave to reargue this proceeding, or, in the alternative, for leave to appeal to the Court of Appeals for the order of this Court entered on March 10, 1966,

Now, upon reading and filing the notice of motion dated March 22, 1966, with proof of due service thereof, and the affidavit of Leonard Feldman, duly sworn to March 23, 1966, in support of said motion, and the affidavit of Angelo T. Cometa, duly sworn to March 28, 1966 in opposition thereto, and after hearing Mr. Leonard Feldman for the motion, and Mr. Angelo T. Cometa opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied in all respects.

Enter:

Hyman W. Gamso
Clerk.

Notice of Entry

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

I, HYMAN W. GAMSO, Clerk of the Appellate Division of the Supreme Court, First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on Apr 12 1966 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on Apr 12 1966

HYMAN W. GAMSO
Clerk

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of
JACOB MILLSTEIN,
An Attorney

SIR:

PLEASE TAKE NOTICE, that the respondent, Jacob Millstein, hereby appeals to the Court of Appeals as of right, from an order of disbarment dated March 10, 1966, entered in the Office of the Clerk of the Appellate Division, First Department, on March 10, 1966, and that upon said appeal appellant will submit to the Court of Appeals that the failure of the petitioner, Coordinating Committee on Discipline, to produce evidence in its possession, which evidence was properly and timely demanded, constituted a violation of the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 6, of the Constitution of the State of New York.

Dated: New York, N. Y.
March 22, 1966

Yours, etc.,

EIBER, OKIN, RAFSKY & FELDMAN,
Attorneys for Respondent,
Office & P. O. Address,
350 Fifth Avenue,
New York 1, N. Y.

To:

ANGELO T. COMETA, Esq.,
Attorney for Petitioner,
100 Centre Street,
New York, N. Y.

CLERK OF THE APPELLATE DIVISION,
FIRST DEPARTMENT.

Order Denying Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A. D. 1966.

PRESENT, HON. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 563

In the Matter of

JACOB MILLSTEIN, an Attorney,

Appellant,

CO-ORDINATING COMMITTEE ON DISCIPLINE, FIRST JUDICIAL DEPARTMENT,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy.

GEARON KIMBALL
Deputy Clerk

Order of Court of Appeals Dismissing Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-second day of September A. D. 1966.

Present, Hon. CHARLES S. DESMOND, Chief Judge, presiding.

No. 857

In the Matter of

JACOB A. MILLSTEIN, An Attorney,

Appellant,

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed for lack of a substantial constitutional question.

A copy

GEARON KIMBALL
Deputy Clerk

BLANK

PAGE

BLANK

PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 834

In the Matter of

JACOB A. MILLSTEIN,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

ANGELO T. COMETA
Attorney for Respondent
36 West 44th Street
New York, New York 10036

BLANK

PAGE

INDEX

PAGE

Preliminary Statement 1

Opinions Below 2

Jurisdiction 2

Statement of the Case 2

1. The Facts and Proceedings Below 2

2. The Creation of the Co-ordinating Committee and Its Purpose 5

The Issue Presented 6

ARGUMENT

POINT I:

Under prevailing Federal and State law, respondent properly refused to produce for petitioner's inspection sworn statements given by persons who appeared during respondent's preliminary inquiry, but who did not testify before the referee 7

POINT II:

The issue relating to the scope of C. P. L. R. §3101 does not meet this Court's requirements for reviewability 13

CONCLUSION 13

PAGE

APPENDIX:

Order of Appellate Division, First Department, Dated February 3, 1959 15

TABLE OF AUTHORITIES

Cases:

Brady v. State of Maryland, 373 U. S. 83 11

Gordon v. United States, 344 U. S. 414 7

Jencks v. United States, 353 U. S. 657 ..... 7, 8, 10

Matter of Jacob A. Millstein, 25 A. D. 2d 129 2

People v. Fein, 18 N. Y. 2d 162, 272 N. Y. S. 2d 753 9
People v. Malinsky, 15 N. Y. 2d 86 9
People v. Pizarro, 15 N. Y. 2d 803 ..... 9, 12
People v. Rosario, 9 N. Y. 2d 286 ..... 8, 9, 10

Smith v. Pennsylvania, 376 U. S. 354 11

Willner v. Committee on Character and Fitness, 373 U. S. 96 12

Statutes and Orders:

28 U. S. C. §1257(3) 2, 13

18 U. S. C. §3500 8

Order of Appellate Division, First Department, dated February 3, 1959, establishing Co-ordinating Committee on Discipline 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 834

In the Matter of

JACOB A. MILLSTEIN,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

Petitioner prays for the issuance of a writ of certiorari to review the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered March 10, 1966, disbarring petitioner from practice as an attorney and counselor-at-law.

Opinions Below

The memorandum opinion of the Appellate Division ordering petitioner's disbarment is reported as *Matter of Jacob A. Millstein* in 25 A. D. 2d 129 (1st Dept. 1966). Petitioner moved in the Court of Appeals for leave to appeal on certain non-constitutional issues, which motion was denied on July 7, 1966, —— N. Y. 2d ——. Petitioner also moved in the Court of Appeals for leave to appeal on stated constitutional issues. This application was denied on September 22, 1966 on the ground that the constitutional questions presented were not substantial, —— N. Y. 2d ——.

Jurisdiction

This Court's jurisdiction rests on 28 U. S. C. §1257(3).

Statement of the Case

1. *The Facts and Proceedings Below*

A petition charging the petitioner with professional misconduct was served upon him on March 29, 1963 by the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, New York County Lawyers' Association and the Bronx County Bar Association, respondent herein. Petitioner's answer was served upon respondent on May 1, 1963, after which the Appellate Division, by order of May 16, 1963, appointed a referee to hear the evidence and report thereon to the Court.

On August 26, 1963, petitioner served upon respondent motion papers in connection with his application for an order granting discovery and inspection of all testimony, statements and exhibits in respondent's possession. The Appellate Division, on October 3, 1963, unanimously denied petitioner's application.

Petitioner then served upon respondent, on October 28, 1963, a notice of motion returnable in the Appellate Division for an order granting leave to reargue, or in the alternative, for leave to appeal to the Court of Appeals, which was unanimously denied by order of November 19, 1963.

Thereafter, petitioner's application for leave to appeal to the Court of Appeals was denied by that Court on January 9, 1964.

Petitioner's petition for writ of certiorari was denied by this Court on May 18, 1964, 377 U. S. 833.

All of the above proceedings took place prior to commencement of hearings before the referee on November 9, 1964. Respondent completed its case on February 10, 1965. On February 15, 1965, petitioner served respondent with an order to show cause in the Appellate Division, which sought the disclosure by respondent of all statements, testimony and documents in respondent's possession not already disclosed, and relating to one Dansker, one Sapot and the petitioner. The application was referred to the entire Bench, whereupon the Appellate Division, on March 18, 1965, unanimously denied the application.

Petitioner then moved in the Appellate Division for reargument or for leave to appeal to the Court of Appeals, with a stay of proceedings pending disposition, all of which was denied by order of April 13, 1965.

Prior to completion of his case before the referee on April 22, 1965, petitioner had appealed to the Court of Appeals from the Appellate Division's order of March 18, 1965. The Court of Appeals denied this application by its order of May 20, 1965. Incidental to his Court of Appeals motion, the petitioner, on April 29, 1965, applied to Honorable Stanley H. Fuld for a stay of any further disciplinary proceedings. Judge Fuld, after hearing arguments from both petitioner and respondent, refused to stay the proceedings.

Petitioner returned to this Court with a second application for writ of certiorari, which was again denied, 382 U. S. 902.

By his report* to the Appellate Division, dated August 31, 1965, the referee sustained a number of charges, including that which alleged petitioner's initiation and implementation of a corrupt conspiracy to solicit claims for personal injuries. This charge, among others, formed the basis of the Appellate Division's opinion which accompanied its order disbarring the petitioner (*supra*).

The petitioner's motions in the Appellate Division for reargument and for leave to appeal to the Court of Appeals and his application in the latter Court on both constitutional and non-constitutional grounds were denied as detailed above.

With the instant application, petitioner has been before this Court three times with the same demand. His first petition was addressed to the Court before the hearings were

---

* The details of this report as well as the substance of motions, supporting papers, briefs in opposition, Court orders, etc. are contained in the certified record submitted with the petition herein.

commenced. His second application was made upon completion of the hearings, but prior to a final disposition of the formal charges by the Appellate Division. The Appellate Division having finally determined the issue with its order of disbarment, petitioner herein renews his plea.

2. *The Creation of the Co-ordinating Committee and Its Purpose*

The Co-ordinating Committee on Discipline was established in 1958 by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department. The Committee's continuing operation responds to an apparent need for a systematic examination of the practices of attorneys who specialize in personal injury cases.

For many years prior to 1958, prosecutors in the counties of New York City from time to time had investigated and prosecuted attorneys and those associated with them in the handling of such cases, for unlawful solicitation and for the violation of other sections of the Penal Law. These sporadic efforts had only a limited effect on the undesirable practices which were coming to be all too commonplace in the area of contingent fee practice.

On February 3, 1959, the Appellate Division, pursuant to the provisions of Section 90 of the Judiciary Law and in the exercise of its inherent powers, ordered the Co-ordinating Committee to conduct:

> "... a continuous examination and study of the Statements of Retainer and Closing Statements filed with the Appellate Division in the First Judicial Department, pursuant to the applicable rules of this Court, for the following purposes: 1. Compilation and interpretation of relevant statistics and data; 2. Observa-

tion, consideration and, where necessary, correction of the professional conduct of attorneys and those employed by them or associated with them in any manner whatever in representing either plaintiffs or defendants or their indemnitors, insurers, subrogors, or subrogees in those actions in which such statements are required to be filed by the rules of the court . . ."

The Committee has full subpoena powers and, in addition, all pertinent records, papers and documents filed in the Appellate Division are available to it for the purpose of its examination and study. Since the establishment of the Judicial Conference of the State of New York as the Court's chief administrative agency, pertinent records filed with that agency are also made available to the Committee.

The Issue Presented

In denying petitioner's demand for inspection of prior statements and documents having no relation to nor bearing upon the testimony of witnesses who actually testified before the referee, did respondent (and in effect, the Courts of the State of New York in supporting respondent's position) deny petitioner his right to due process under the 14th Amendment to the Constitution of the United States?

ARGUMENT

POINT I

Under prevailing Federal and State law, respondent properly refused to produce for petitioner's inspection sworn statements given by persons who appeared during respondent's preliminary inquiry, but who did not testify before the referee.

It is well established that a defendant in a criminal case has the right to the production for inspection of documents, reports, prior statements and the like in the possession of a prosecutor when these specific documents contain statements from persons offered by the prosecution as witnesses at the trial.

This Court, in *Jencks* v. *United States*, 353 U. S. 657, 667, reiterated the necessary elements which determine the accused's right to inspect such material:

> "The necessary essential of a foundation . . . and present here, are that '[t]he demand was for production of . . . *specific documents and did not propose any broad or blind fishing expedition* among documents possessed by the Government on the chance that something impeaching might turn up. Nor was this a demand for statements taken from persons or informants not offered as witnesses.' (Emphasis added by the Court.) [Citing *Gordon* v. *United States*, 344 U. S. 414, 419.] We affirm and re-emphasize these essentials. 'For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule . . .' 344 U. S. at 420."

Following *Jencks,* Congress enacted 18 U. S. C. §3500 entitled "Demands for production of statements and reports of witnesses." There follow relevant portions of this statute, known as the Jencks Act:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. (b) After a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Court shall order it to be delivered directly to the defendant for his examination and use . . ."

In New York, the Court of Appeals enunciated this State's rule of disclosure in criminal cases when it held that the defense is entitled to examine a witness' prior statement whether or not it varies from his testimony on the stand, *People* v. *Rosario,* 9 N. Y. 2d 286. The Court of Appeals, in language similar to that used by this Court in postulating the *Jencks* rule, further stated:

> "It does not mean that the defense will be able to go on a tour of investigation seeking general useful in-

formation. *Our decision presupposes that the statement relates to the subject matter of the witness' testimony, that it is to be used for impeachment purposes* only after direct examination." (Emphasis supplied.) 9 N. Y. 2d at 290.

See also: *People* v. *Malinsky,* 15 N. Y. 2d 86, which reaffirms the *Rosario* rule, and *People* v. *Pizarro,* 15 N. Y. 2d 803, in which it was held that the defense is entitled to the Grand Jury minutes of testimony by the People's witnesses who testify at trial.

Petitioner has quoted liberally from the recent dissent of Hon. Stanley Fuld of the Court of Appeals in the case of *People* v. *Fein,* 18 N. Y. 2d 162, 272 N. Y. S. 2d 753, a portion of which appears in the petition (14*) as follows:

"The prosecution is not privileged to decide for the court what is admissable or for the defense what is useful." (Citation)

The complete paragraph from which petitioner has extracted the above sentence reads (citations omitted) as follows:

"The concept of fairness, of due process, imposes upon the prosecution a duty to apprise the defense of evidence favorable to the accused, *particularly when such evidence contradicts the testimony given by the People's witnesses in open court* . . . This duty persists even though the defense might, by dint of a little more effort, have independently uncovered the evidence in question and even though the district at-

* Parenthetic numerical references are to the petitioner's brief in the instant application.

torney regards it as lacking in probative force or worthless . . . The prosecution is not privileged 'to decide for the court what is admissable or for the defense what is useful'." (Emphasis supplied.)

Respondent has scrupulously complied with the rule of disclosure as set forth in *Rosario.** Petitioner was confronted with the witnesses who testified against him and was given the fullest opportunity to cross-examine such witnesses. After each witness upon direct examination completed his testimony, the respondent provided petitioner with a transcript of the witness' testimony in the preliminary inquiry together with all pertinent exhibits, notes and other relevant material.

Petitioner is not content with the remedies which both state and federal law afford him. He demands not the statements of witnesses who testified at trial, but rather the statements of "any other witnesses who . . . were heard by respondent *in camera* and not called (before the referee)" (11). Respondent urges that petitioner is not entitled to this revolutionary relief, either under federal (*Jencks*) or state (*Rosario*) law.

The weakness of petitioner's position is obvious when it is noted that he failed to call to the stand witnesses who were just as much within his control as they were within the control of respondent. Petitioner had prior relationships with the witnesses who appeared before respondent in the preliminary proceeding, and he knew who these witnesses were. A statement given by one Holt, an

---

* Respondent follows the *Rosario* Rule even though it has never contended that a disciplinary proceeding is criminal in nature—see Respondent's Briefs in this Court, No. 455, October, 1965 and No. 970, October, 1963.

attorney, who did not testify before the referee, is one of the items petitioner refers to in his brief (11). Holt, a former associate of petitioner, was certainly available to petitioner if his testimony was thought to be relevant. Petitioner's failure to call Holt and others can only be attributed to his own analysis of their relevancy to the proceeding. Did Holt have material testimony to offer in this proceeding? The answer quite clearly is, he did not.

Nevertheless, petitioner stands before this Court and demands the statement of Holt (among others) given before the respondent in the preliminary inquiry, notwithstanding the fact that Holt never testified before the referee and notwithstanding the fact that he, the petitioner, could have called this same Holt at any time to determine whether or not Holt had relevant testimony to offer.

The law which petitioner cites in his brief fails to support his contentions.

In *Brady* v. *State of Maryland*, 373 U. S. 83, this Court held that the suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

If petitioner is charging that respondent has suppressed evidence favorable to him, let him so state with supporting facts. His failure to do so in the many applications made to this Court as well as to the Appellate Division and the Court of Appeals can only indicate that there is no suppression issue before this tribunal.

Petitioner cites *Smith* v. *Pennsylvania*, 376 U. S. 354, which is also irrelevant. In *Smith*, the petitioner had re-

quested, and was denied, access to statements taken from two *witnesses* for the State, which statements petitioner said he needed for impeachment purposes. This Court held that petitioner was entitled to the statements,

Here, petitioner demands not the sworn statements of witnesses who testified at trial, but rather the statements of those who did *not* testify at trial. This posture, taken to its extreme in the area of criminal law, would result in holding that a defendant accused of committing a crime is entitled to the testimony of all witnesses who appeared before the Grand Jury, whether or not they testified at trial. This is without doubt not the law today, *People* v. *Pizarro, supra.*

In *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, this Court held that the requirements of due process must be met before a State can exclude a person from the practice of law. The petitioner was entitled to notice of, and a hearing on, the grounds for his rejection, either before the Committee or before the Appellate Division.

In the instant case, all of the procedural requirements outlined in *Willner* were fully complied with by respondent.

Petitioner urges that he is entitled to the universal disclosure demanded, since such relief is available to even "the meanest souled suitors and lowliest criminals" (15). The remedies of disclosure and inspection available to the accused criminal in both the federal and New York courts have been set forth above. It is patently clear that petitioner's demands are far beyond the scope of prevailing law.

POINT II

The issue relating to the scope of C. P. L. R. §3101 does not meet this Court's requirements for reviewability.

The only issue presented is whether the Court of Appeals of the State of New York correctly construed and applied a State statute, Section 3101 of the New York Civil Practice Law and Rules. No question of the constitutionality of Section 3101 was raised below or is sought to be raised in this Court. Thus it is clear that the judgment of the Court of Appeals on this issue does not meet the requirements for reviewability set forth in 28 U. S. C. §1257(3), the pertinent portion of which limits review of State court judgments by way of certiorari to cases ". . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . ." The scope of Section 3101 is an issue solely of the proper construction of a State statute the validity of which is not drawn in question. Petitioner has not only failed to meet his burden of showing the issue to be of sufficient importance or widespread application in the administration of justice to suggest the appropriateness of review by way of certiorari; he has not even adduced a jurisdictional theory on which the writ could conceivably be granted.

CONCLUSION

The petition for writ of certiorari should be denied.

December, 1966

Respectfully submitted,

ANGELO T. COMETA
Attorney for Respondent

BLANK

PAGE

BLANK

PAGE

APPENDIX

Order of Appellate Division, First Department, Dated February 3, 1959

Pursuant to the provisions of Section 90 of the Judiciary Law and in the exercise of the inherent powers of this court the Justices of the Appellate Division of the Supreme Court in and for the First Judicial Department do hereby

Order a continuous examination and study of the Statements of Retainer and Closing Statements filed with the Appellate Division in the First Judicial Department, pursuant to the applicable rules of this court, for the following purposes: 1. Compilation and interpretation of relevant statistics and data; 2. Observation, consideration and, where necessary, correction of the professional conduct of attorneys and those employed by them or associated with them in any manner whatever in representing either plaintiffs or defendants or their indemnitors, insurers, subrogors, or subrogees in those actions in which such statements are required to be filed by the rules of the court; and it is further

Ordered that this examination and study shall continue until further order of this court; that the same be conducted under the supervision of the Presiding Justice of this court by such employees of this court and of the Supreme Court in and for the First Judicial Department as he may designate and by the members of the Co-ordinating Committee on Discipline and such members of the Grievance Committee of the Association of the Bar of the City of New York, the Committee on Discipline of the New York County Lawyers Association and the Grievance Commit-

tee of the Bronx County Bar Association as may be designated and it is further

Ordered that all subpoenas issued by the Clerk of this court in connection with this examination and study be made returnable at the Courthouse of the Appellate Division in and for the First Judicial Department at 25th Street and Madison Avenue, New York, New York, or at the office of the Association of the Bar of the City of New York, the New York County Lawyers Association or the Bronx County Bar Association or such other places as may be designated by the Presiding Justice of this court, and that all examinations and hearings be held at said places or such other places as may be designated by the Presiding Justice of this court, and it is further

Ordered that all pertinent records, papers and documents filed in this court shall be available for the purpose of this examination and study.

Dated, New York, February 3, 1959.

BERNARD BOTEIN
Presiding Justice

CHARLES D. BREITEL
MARTIN M. FRANK
JAMES B. M. MCNALLY
FRANCIS L. VALENTE
HAROLD A. STEVENS
Associate Justices

BLANK

PAGE

BLANK

PAGE

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JAN 11 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 834

In the Matter
of
JACOB A. MILLSTEIN,
Petitioner,
against
CO-ORDINATING COMMITTEE ON DISCIPLINE,
Respondent.

PETITIONER'S REPLY BRIEF

LEONARD FELDMAN,
Attorney for Petitioner,
350 Fifth Avenue,
New York, New York,
(212) LO 5-1500.

BLANK

PAGE

TABLE OF CONTENTS

	PAGE
In Reply to Respondents' Point I	1
In Reply to Respondents' Point II	4

Cases Cited:

Brady v. *State of Maryland,* 373 U. S. 83, 83 S. Ct. 1194	2
Jencks v. *United States,* 353 U. S. 657, 77 S. Ct. 1007	2

Statute Cited:

28 U.S.C.A. Section 1257	4

BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 834

In the Matter
of
JACOB A. MILLSTEIN,
Petitioner,
against
CO-ORDINATING COMMITTEE ON DISCIPLINE,
Respondent.

PETITIONER'S REPLY BRIEF

In Reply to Respondents' Point I

Although many charges were preferred against the petitioner, and prosecuted by respondent,[1] he was found guilty and disbarred on only three of them. Three persons, *Cruz, Padilla* and *Holt,* who were not called as witnesses by respondents, were critically involved in those three charges. This is not denied by the respondents.

Respondents also do not deny that in the course of their investigation they obtained and throughout the proceedings against petitioner they were in possession of statements or testimony taken by them from Cruz, Padilla and Holt.

1. Referred to in the text as "respondents" by reason of their constituent nature.

The issue then is whether an attorney under charges and on trial for his honor and professional life is entitled to the same rights of disclosure upon demand that a criminal defendant is. This Honorable Court has held that due process requires such disclosure. We are not dealing here with any "fishing expedition" or any unusual expansion of normal and established concepts of a fair trial.

It is the withholding of *evidence* by a prosecution which determines whether the standards of due process have been met. In the case at bar such a withholding took place and is not denied by the respondents. Respondents cannot now be heard to argue that petitioner might have discovered the same evidence. Evidence was and still is in existence. Respondents had and still have that evidence. This is no game in which the petitioner loses if he cannot match the respondents' investigative resources which are also aided and abetted by the broadest kind of subpoena power (see respondents' brief).

It is an impoverished argument, indeed, which proposes that a prosecutor's withholding of evidence is excusable if the defendant can call as witnesses those persons who gave the withheld statements to the prosecutor. There is nothing in *Brady* v. *State of Maryland*, 373 U. S. 83, 83 S. Ct. 1194, or *Jencks* v. *United States*, 353 U. S. 657, 77 S. Ct. 1007, which even suggests such a bizarre standard. The suggestion seems to be that respondents as a public body had the right to a selective presentation of those witnesses most likely to insure conviction. Respondents here miss the point completely. Elementary fairness required that the petitioner be allowed to read what these three crucial witnesses said to the prosecutor at a time when they were free of the pressures of trial, within the protective confines of the prosecutor's office and

perhaps exculpating the petitioner by telling the truth. Try as one might, one cannot fathom why the prosecution here insisted on withholding the statements of these three crucial witnesses even *after* the prosecution completed its case. The inference is fairly drawn and inescapable that Cruz, Padilla and Holt *exculpated* the petitioner or else cast such doubt on the credibility of the prosecution's other witnesses as to make it mandatory on the prosecution not to call Cruz, Padilla and Holt as witnesses and to withhold their statements lest their disclosure lead to their being called as witnesses by petitioner.

This Honorable Court has held that where a prosecutor is in possession of *evidence,* it must be disclosed on demand. These respondents were no less prosecutors than a district attorney is a prosecutor. In the case at bar, demand for the withheld evidence was made before the hearings started, and demand was again made on respondents during the hearings, but after the respondents' case was concluded and they could no longer be prejudiced by any disclosure.

And so we come to the fundamental issue. Is the standard of due process for an attorney under charges different than it is for a criminal defendant?

It is respectfully submitted that this is a critical issue and national in significance. It is the bar which is universally hailed by innumerable statesmen at almost every public opportunity as the bulwark of liberty. If members of the bar can be disciplined without *complete* regard for and adherence to the standards of due process, then the bar must of necessity become a fearful bar. It it too obvious to be pressed that a fearful bar is worse than no bar at all.

In Reply to Respondents' Point II

28 U.S.C.A. 1257, establishes jurisdiction in this Court for review where any "right, privilege or immunity is * * * claimed under the constitution * * *".

Petitioner claims that he was denied the equal protection of the laws by the failure of the courts in New York to grant him a discovery to which he was statutorily entitled—assuming a disciplinary proceeding to be a civil proceeding. The Fourteenth Amendment imposes upon the states the obligation to afford to their citizens the equal protection of their laws. By denying to petitioner the right to a discovery assured him by statute, the courts of New York denied him the equal protection of the laws of New York.

This Honorable Court has jurisdiction of such issue.

CONCLUSION

It is respectfully submitted that the Writ sought should be granted.

Respectfully submitted,

LEONARD FELDMAN,
Attorney for Petitioner.